

UNITED STATES OF AMERICA,
Plaintiff,
vs.
TONY McCLURG,
Defendant.

November 15, 2017
3:21 p.m. to 4:07 p.m.

FOR THE PLAINTIFF: KELLY A. NORRIS, ESQUIRE
Assistant United States Attorney
United States Department of Justice
Office of the United States Attorney
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Knoxville, Tennessee 37902

FOR THE DEFENDANT: PAULA R. VOSS, ESQUIRE
Federal Defender Services of
Eastern Tennessee, Inc.
800 South Gay Street
Suite 2400
Knoxville, Tennessee 37929-9714

ALSO PRESENT: TONY McCLURG, DEFENDANT

REPORTED BY:
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1 (Call to Order of the Court)

2 THE COURT: Thank you. Good afternoon, everyone.
3 Let's call up the next case, please.

4 THE COURTROOM DEPUTY: Criminal Action 3:12-CR-11.
5 United States of America versus Tony McClurg.

6 Kelly Norris is here on behalf of the government. Is
7 the government present and ready to proceed?

8 MS. NORRIS: Present and ready, Your Honor.

9 THE COURTROOM DEPUTY: Paula Voss is here on behalf
10 of the defendant. Is the defendant present and ready to
11 proceed?

12 MS. VOSS: Yes, he is, Your Honor.

13 THE COURT: Thank you. We're here for imposition of
14 judgment and sentence in this case. Before we ask the
15 defendant to come up to the podium, let me give just a little
16 background. Hold on just a second.

17 MS. VOSS: Oh, before we do that.

18 THE COURT: Before we do that, just going to give a
19 little background for the record.

20 As everyone will recall, on October 31, 2012, this
21 defendant, Mr. McClurg, appeared before this Court and pled
22 guilty to the sole count of the indictment, charging him being
23 a felon in possession of a firearm in violation of 18 U.S.C.
24 Section 922(g)(1) and 924(e).

25 On February 27th, 2013, the Court sentenced the

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1 defendant to a term of 180 months imprisonment, followed by
2 three years of supervised release. This sentence was based in
3 part on the defendant's designation as an armed career criminal
4 under 18 U.S.C. Section 924(e) and Sentencing Guideline
5 Section 4B1.4. The Court found at that time that the defendant
6 had three prior violent felony predicate offenses under the
7 Armed Career Criminal Act, specifically three aggravated
8 burglary and theft conditions, all under Tennessee law.

9 On June 18, 2014, the defendant filed a motion to
10 vacate, set aside, or correct his sentence under 18 U.S.C.
11 Section 2255, which he then supplemented after issuance of the
12 United States Supreme Court's decision in Johnson v. United
13 States in 2015. The court in Johnson held that the residual
14 clause of the Armed Career Criminal Act was unconstitutionally
15 vague.

16 The Court deferred ruling on the defendant's motion
17 until issuance of the Sixth Circuit's en banc decision in
18 United States v. Stitt, S-t-i-t-t, which was decided in 2017.
19 The court -- the Sixth Circuit in Stitt held that a conviction
20 for aggregated burglary under Tennessee law does not qualify as
21 a violent felony predicate offense under the ACCA.

22 Accordingly, the defendant lacks the three predicate
23 offenses required for an armed career criminal enhancement. In
24 fact, on July 27th, 2017, the parties filed a joint status
25 report in which they agreed that the defendant was entitled to

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1 relief under Section 2255 in light of Johnson and Stitt, but
2 disagreed as to the appropriate form of relief. The Court thus
3 entered an order granting the defendant's Section 2255 motion,
4 vacating his sentence, and scheduling this matter for
5 resentencing, which brings us here today.

6 So with that background in mind, if the defendant
7 would please come up to the lectern, along with his counsel,
8 we'll begin by having you sworn in by the courtroom deputy.

9 THE COURTROOM DEPUTY: Sir, if you'll raise your
10 right hand.

11 (The Defendant Is Sworn.)

12 THE COURTROOM DEPUTY: Would you please state your
13 name for the record.

14 THE DEFENDANT: Tony McClurg.

15 THE COURT: Thank you, Mr. McClurg. Let me ask you
16 to confirm you're represented here today by Ms. Paula Voss. Is
17 that correct?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Ms. Voss, you're here as counsel for this
20 defendant?

21 MS. VOSS: Yes, your Honor.

22 THE COURT: As previously stated, Mr. McClurg, on
23 October 31, 2012, you pled guilty to the sole count of the
24 indictment in this case, charging you with being a felon in
25 possession of a firearm in violation of 18 United States Code

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1 Section 922(g) (1) .

2 Do you understand the offense described in Count 1
3 requires a sentence of up to ten years imprisonment, up to
4 three years supervised release, a \$250,000 fine, and a \$100
5 special assessment.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. The Court understands that
8 the government now agrees that the defendant is not eligible
9 for an armed career criminal enhancement, and, thus, there's no
10 need to ask the defendant to affirm or deny his previous
11 convictions for Tennessee burglary. Is that correct?

12 MS. NORRIS: Your Honor, if I may, for purposes of
13 the record, we are objecting to the absence of an armed career
14 criminal enhancement. We realize this Court is obligated to
15 follow Stitt which prevents that classification. But we
16 contend that Stitt was wrongly decided, so we object to
17 preserve the issue for possible future review.

18 THE COURT: Thank you.

19 Anything further on that point, Ms. Voss?

20 MS. VOSS: Stitt is the law, Your Honor.

21 THE COURT: Well, the Court notes the government's
22 objection, but is not otherwise going to go through the
23 affirmation process that it typically would if it was going to
24 classify someone as an armed career criminal, again, based on
25 Stitt and based on the previously filed status report.

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1 MS. VOSS: And I concur with that, Your Honor.

2 THE COURT: The Court will proceed in that fashion.

3 So let me ask you, Mr. McClurg, I know you, at the
4 time -- it's been a while, but back in 2013, I asked if you had
5 reviewed and read the presentence report at that time, and you
6 stated you had. We now have a revised presentence report
7 before us.

8 And have you had the opportunity to read and discuss
9 the revised presentence report in this case with your attorney?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And Ms. Voss, have you received the
12 revised presentence report and reviewed it with Mr. McClurg?

13 MS. VOSS: Yes, I have, Your Honor.

14 THE COURT: And defendant has filed a notice of no
15 objection. To confirm, does the defendant have any objections
16 to revised presentence report.

17 MS. VOSS: No objections, Your Honor.

18 THE COURT: Ms. Norris, have you received the
19 presentence -- the revised presentence report in this case?

20 MS. NORRIS: Yes, Your Honor.

21 THE COURT: Does the government have any objection?

22 MS. NORRIS: Your Honor, as stated, we are objecting
23 to the lack of the armed career criminal enhancement. Again,
24 based on Stitt, we recognize that the Court must follow the law
25 as it currently is, but we are objecting to preserve the issue

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1 for appeal, but otherwise there are no objections.

2 THE COURT: Thank you. Does government have a motion
3 for third-level acceptance of responsibility pursuant to
4 Sentencing Guideline Section 3E1.1(b).

5 MS. NORRIS: Yes, Your Honor, the government so
6 moves.

7 THE COURT: Without objection, that motion will be
8 granted.

9 For purpose of resentencing, the Court has received
10 the defendant's sentencing memorandum, as well as the
11 government's sentencing memorandum and motions for upward
12 variance.

13 Why don't we begin with the government, perhaps, and
14 then if anything further -- well, we'll let -- Mr. McClurg, if
15 you'll have a seat, along with your counsel, we'll let
16 Ms. Norris take the podium and we'll hear from the government.

17 The Court has reviewed all the materials submitted by
18 the parties, obviously, but we'll allow the government to
19 address imposition of sentence as well as the government's
20 motion, and then we'll allow the defendant via counsel to
21 respond. And then we'll conclude, as we did in the previous
22 sentencing, with the opportunity for Mr. McClurg to allocute or
23 make any statements that you would like to on your behalf.

24 Ms. Norris, go ahead.

25 MS. NORRIS: Yes, Your Honor. As the Court noted,

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1 the United States has moved for an upward variance in this
2 case. The biggest reason to move for the sentence requested,
3 which would be to impose a sentence within the range of 92
4 months to 115 months in this case is based on a fairness
5 argument.

6 And that in 2013, when this defendant was sentenced,
7 at that time, burglary of a dwelling was included in the
8 definition of a crime of violence. And, therefore, if this
9 defendant had not been deemed and armed career criminal, which
10 he rightly was at the time, the Court would have started his
11 offense level at a offense level 24.

12 The United States notes that since that time, since
13 the time of the guidelines when the defendant was sentenced in
14 2013, the Sentencing Commission has eliminated from the
15 definition of a crime of violence the enumerated offense of
16 burglary of a dwelling and has also eliminated the residual
17 clause, but it's not because it's been deemed unconstitutional.

18 In fact, the United States Supreme Court has held
19 that the Guidelines are and were constitutional as written, and
20 therefore the Court would have rightly found this defendant to
21 start at a base offense level 24, enhanced based on the number
22 of firearms he had, and with the three-level reduction, he
23 would have been at an offense level 23, criminal history
24 category VI, which would have given him a Guidelines range of
25 92 months to 115 months.

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1 I think the most striking point to be made as to this
2 argument, is that a defendant sentenced at the exact same time
3 as this defendant, who had one less -- one less aggravated
4 burglary conviction would have gotten a sentence within this
5 range. That defendant -- because this defendant has three
6 aggravated burglary convictions, it only takes two to be given
7 an offense level 24, so a defendant with one less aggravated
8 burglary conviction would be -- would have been given by this
9 Court a sentence within the range of 92 months to 115 months,
10 and that defendant is still sitting in prison right now with
11 that sentence with no recourse.

12 The purposes of 2255 are to put a defendant back in
13 the situation he would have been but for the
14 unconstitutionality, in the case, but for him being found to be
15 an armed career criminal. That's what this -- what this Court
16 should do, is put him back in that same position.

17 There are cases, Sixth Circuit case, P --
18 Pasquarille, P-a-s-q-u-a-r-i-l-l-e, versus United States. It's
19 a December 9th, 1997 case that I just recently found that says
20 that's the purpose of 28 U.S.C. Section 2255, to put a
21 defendant in the same position he would have been in.

22 So let's do that in the case, Your Honor. Let's put
23 this defendant back in the same situation he would have been in
24 in 2013 when he was sentenced for being a felon in possession
25 of a firearm for having three firearms. He should be an

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1 offense level 26 reduced by three levels to a 23 and a criminal
2 history category VI.

3 This extreme windfall for this defendant in this case
4 is just not warranted. This defendant has 25 prior convictions
5 to include three aggravated burglary convictions and two
6 burglary conviction. His probation has been revoked on
7 numerous occasions.

8 And, Your Honor, this defendant has been involved in
9 the criminal justice system his entire life. He earned
10 convictions at the age of 21 in 1997, at the age of 24 in 2000,
11 multiple convictions in each of these years. At the age of 26
12 in 2002, age of 27 in 2003, age 31 in 2007, age 32 in 2008, age
13 34 in 2009, age 34 in 2010, and here he -- the instant matter
14 he committed in 2012.

15 A serious lengthy sentence is warranted for this
16 defendant. He has shown the Court time and time again he
17 cannot comport with the confines of the law in this country,
18 and, frankly, a hefty sentence is warranted.

19 So therefore, Your Honor, the United States is asking
20 for what it would deem to be an appropriate Guidelines range
21 sentence to fall within a term of 92 months to 115 months.

22 There is an alternative argument the United States
23 would like to make if the Court decides to sentence him to a
24 lesser sentence, and I'm not sure if this is an appropriate
25 time to raise that issue as well.

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1 THE COURT: Go ahead.

2 MS. NORRIS: If the Court does decide that the
3 Sentencing Guidelines as calculated, and rightly it's
4 calculated based on the law in this case, I think it's a term
5 of 30 to 37 months is appropriate, the United States would ask
6 for a time served sentence as opposed to a number term of
7 imprisonment.

8 Your Honor, the -- simply put, the Court should not
9 sentence this defendant to a lesser term of imprisonment than
10 what he's already served, and a time served sentence would -- a
11 sentence other than a time served sentence would cause issue
12 with the Bureau of Prisons and also give him some unjustified
13 possible benefit in the future if he's to violate his
14 supervised release.

15 That time would be credited towards any future
16 supervised release violations, and therefore, he would
17 basically get a get-out-of-jail-free card if he violates his
18 supervision in the future. That's just not something I don't
19 think the Court wants to basically encourage the defendant to
20 go out and commit more crimes because he wouldn't have any
21 recourse for that.

22 And therefore if the Court deems a sentence within
23 that range or a sentence lesser than what's already served is
24 warranted, the United States is asking for a time served
25 sentence, but certainly is not attempting to belittle its

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1 request for a range of 92 to 115 months in prison.

2 Thank you.

3 THE COURT: Thank you, Ms. Norris.

4 Ms. Voss, if you would like to respond to the
5 government's motion or otherwise address sentencing from the
6 defendant's perspective.

7 MS. VOSS: Thank you, Your Honor.

8 When we first started getting these cases back
9 from -- on the 2255s that were granted following Stitt, there
10 was a lot of talk about which guidelines were going to be
11 applied. As I understand it now, the government is agreeing
12 and not objecting to the application of the 2016 Guideline to
13 Mr. McClurg's case. Since I am somewhat concerned that they're
14 going to -- there is going to be appeal if for no other reason
15 than to hold these cases back and see if the government decides
16 to appeal the Stitt case, they still have until a week from
17 Friday, I think, to file a petition for writ of cert with the
18 Supreme Court. And I believe that they are filing appeals in
19 these, so I just want to make clear to the Court that we did
20 make a legal argument for the use of the 2016 Guidelines.
21 Probation has agreed with us.

22 So rather than repeat everything that's in my
23 sentencing memo, I would just ask the Court to allow to us
24 adopt that argument, should there be any further question in an
25 appellate situation.

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1 The government keeps talking, Your Honor, about this
2 being remedial and that the purpose of the 2255 is to put a
3 defendant back into the situation they would have been in, and
4 that's not the case. The 2255 was granted because the sentence
5 he received was unconstitutional. That's a lot different than
6 just sending someone back on a direct appeal.

7 And that difference has been clearly recognized both
8 in the statutes and in the guidelines. So he's back here.
9 He's to be sentenced under the Guidelines in effect at the time
10 of resentencing.

11 It's different if you're up on direct appeal. There
12 is an exception carved out of the statute for cases that are up
13 on direct appeal and remanded for resentencing, yeah, there you
14 go. You stay back and you get your Guideline that you were
15 under at the time. But a 2255 situation is completely
16 different, and that's why we're here under the 2016 Guidelines.

17 I disagree with the government that the Guidelines
18 were simply a change based on Johnson. The commission, when
19 they removed the burglary provision and some other provisions
20 from the definition of crime of violence in the Guidelines were
21 very specific. It was actually the amendment that became
22 effective on August 1st of 2016. It deleted burglary of a
23 dwelling from the definition of crime of violence, both in the
24 commentary to 4B1.2(a) and in the note that followed it.

25 The amendment contains a section on reasons for the

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1 amendment, and it notes that it is the -- quote, result of the
2 commissions' multiyear study, unquote. This was not a
3 knee-jerk reaction to Johnson. This isn't a Beckles situation
4 where the Guidelines are not a constitutional issue.

5 This is a change by the commission based on a
6 multiyear study. It details many of the sources it
7 investigated before making the change. They had round table
8 discussion, case law, public comment, and, quote, a range of
9 sentencing data.

10 They specifically cited studies by the Bureau of
11 Justice, statistics in the Department of Justice, the FBI, the
12 FBI demonstrates that most burglaries, quote, do not involve
13 physical violence. The Department of Justice, their uniform
14 crime report in 2014 classified burglary as a property crime
15 rather than a violent crime.

16 This is not a knee-jerk reaction. They didn't change
17 the definition of crime of violence in 2K2.1 or 4B just because
18 of Johnson. Johnson may have been the catalyst. They might
19 have wanted to keep those things consistent. But that was done
20 in August of 2016 after several years of study.

21 So to say that it shouldn't be applied now is kind of
22 like saying, we should still be sentencing him under the Armed
23 Career Criminal Act. He's to be sentenced under the Guidelines
24 in effect at this time.

25 The disparity argument honestly is one that sort of

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1 puzzles me. And I advised the government that I think it's
2 wrong too, but they should go back and change it to the better
3 for those that were sentenced before and didn't have a
4 constitutional issue. But you don't punish Mr. McClurg because
5 the United States Supreme Court deemed that the sentence he
6 received initially was unconstitutional.

7 In a sense, by asking the Court to use the old
8 Guidelines, they are again asking for an illegal sentence,
9 because that's not the way the Court is supposed to resentence
10 him under the statute itself. So I don't quite understand why
11 we're going back to what he might have gotten under an old set
12 of Guidelines had he still been being sentenced under that.

13 On Mr. McClurg's behalf, I think we spelled out
14 pretty clearly to the Court that he did exceptionally well, I
15 think, while he was incarcerated. He has been in federal
16 custody for, I believe it's 67 months at this point.

17 During that time, he got his GED. He took two drug
18 classes. He wasn't put into the RDAP program, but he did take
19 two other drug classes and completed them. I've attached the
20 various certificates that he earned.

21 He worked. He worked steadily. He did plumbing. He
22 got some skills while he was in there. He had a job the whole
23 time he was there.

24 He took classes. He has serious diabetes, Your
25 Honor, what they call brittle diabetes. It cost one of his

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1 sisters her life and his other sister also struggles with it.
2 He took classes to learn how to better control his diabetes
3 when he gets out, a prison-to-paycheck course.

4 And something that didn't make it to his report, just
5 before they brought him back, he completed a parenting program
6 with them. His son Weston is in the courtroom today. He's
7 maintained a relationship with him. Weston graduates from
8 William Blount in May, thinking about going into the Navy. And
9 Mr. McClurg is concerned about being out and being a good
10 parent to him for as long as he can be.

11 He had one disciplinary write-up, Your Honor.
12 Because of the injuries that we noted to his legs, he was
13 allowed to wear what's called a soft shoe. One of the officers
14 there, as I understand it, challenged him about wearing the
15 wrong shoe, and when he wouldn't change it, that was his
16 disciplinary write-up. And he did have a medical reason and
17 medical permission to wear it.

18 But there's no fights, there's no violence, there's
19 no drugs, there's no alcohol. There's nothing on his
20 disciplinary record, other than good things that showed that he
21 used his time productively.

22 As far as his previous criminal record goes, Your
23 Honor, yes, he's had a lot of arrests. As we pointed out, all
24 of his felonies were those aggravated burglaries that were used
25 to originally classify him as an armed career criminal. And

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1 that was a 60-day splurge that he went on when he was 21. And
2 when he was arrested after the last one, he confessed all five
3 of them.

4 There's no violent crimes. There's no aggravated
5 assaults other than the fact that he was purchasing these
6 firearms and possessing them. There's no indication that he's
7 ever really been arrested for or charged with or convicted of
8 anything truly violent.

9 In view of all that, Your Honor, we are asking for a
10 Guideline sentence of 30 to 37 months. And as I -- I told
11 Ms. Norris, I was going to ask the Court to give him a
12 Guideline sentence and not a time-served sentence. Basically,
13 if you give him a time-served sentence, you're giving him an
14 upward departure. And I don't think there's anything in his
15 history, in his behavior since his first sentencing, since his
16 arrest, actually, or anything else that would require the Court
17 to go above the Guideline range as it now stands.

18 So we would ask the Court for a sentence between 30
19 and 37 months, and hopefully that will get him home. He does
20 have, as you can see, a lot of support still in the community.
21 His mother had cataract surgery this morning, and she still
22 came this afternoon. He has a place to live. He's already
23 been talking to some friends about getting a job at the
24 Rubbermaid factory.

25 So he's looking forward, Your Honor. I think he's

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1 served a good time in prison, and hopefully we're not going to
2 see Mr. McClurg again.

3 THE COURT: Okay. Thank you, Ms. Voss.

4 Ms. Norris, anything further?

5 MS. NORRIS: No, Your Honor.

6 THE COURT: All right. Finally, Mr. McClurg, the
7 Court, I believe, has heard from you in the past, but would
8 welcome the opportunity to hear from you again prior to
9 sentencing.

10 THE DEFENDANT: Go ahead?

11 THE COURT: Go ahead.

12 THE DEFENDANT: Yes, sir, Your Honor.

13 THE COURT: If you'll just make sure you speak up.

14 THE DEFENDANT: I realized that I've done wrong in
15 the future. I'm sorry for that. And I would love to have the
16 chance to right my wrongs and be a good person in society.

17 THE COURT: Okay. Thank you. Why don't you go ahead
18 and have a seat, along with Ms. Voss, and we'll proceed forward
19 with sentencing.

20 Again, the Court appreciates defendant's statement,
21 appreciates the presence of family members and/or friends in
22 court today, and appreciates the written and oral arguments
23 that have been made by counsel for the defendant and counsel
24 for the government in this case.

25 In a manner intended to comply with the Sixth

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1 Circuit's jurisprudence since the Booker case rendered the
2 Sentencing Guidelines advisory and Gall v. United States'
3 requirement that the Court make an individual assessment based
4 on the facts presented and adequately explain the chosen
5 sentence, the Court will explain its reasons for the sentence
6 to be imposed in this case.

7 Before turning to its analysis of the 3553 factors,
8 the Court first will undertake an analysis of the appropriate
9 advisory Guideline range at this time for this defendant.

10 First, the Court finds that it must apply the current
11 version of the United States Sentencing Guidelines in
12 resentencing the defendant rather than the Guidelines that
13 applied as of his original sentencing in 2009.

14 18 United States Code Section 3553(a)(4)(A)(ii)
15 provides that except when resentencing a defendant on remand
16 following an appeal, a district court must apply the version of
17 the Guidelines in effect on the date the defendant is
18 sentenced. The latter phrase being a quote from the statute.
19 Also pertinent Sixth Circuit case law, including specifically
20 Ajan, A-j-a-n, v. United States, a Sixth Circuit 2013 case,
21 indicates that a resentencing that results from the grant of a
22 Section 2255 motion always proceeds de novo.

23 The Sixth Circuit in that case made clear that the
24 district court in such a resentencing has discretion to
25 reconsider the appropriateness of the guidelines as they exist

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1 at the time of the resentencing.

2 Thus, in calculating the defendant's advisory
3 Guideline range, the Court will apply the most recent version
4 of the Guidelines manual, that is the 2016 edition.

5 To that end, the Court has reviewed both the
6 presentence report and state court documentation provided by
7 the defendant in support of his sentencing memorandum.
8 Applying Sections 4A1.1 and 4A1.2, the Court concludes the
9 defendant's total criminal history score is 12, producing a
10 criminal history category of V. And, furthermore, the parties
11 do not dispute that the base offense level for the defendant's
12 conduct under the current Guidelines is 14. Two levels would
13 be added for the specific characteristics of possession of
14 three to seven firearms, and then three levels would be
15 subtracted for the defendant's acceptance of responsibility
16 for a total offense level of 13 and as set forth in
17 Paragraph 63 of the presentence report.

18 Based upon this total offense level of 13 and
19 criminal history category of V, the Guideline imprisonment
20 range is 30 months to 37 months.

21 Turning now to the 3553 factors, which the Court has
22 previously considered back in, I think, 2013, at the time of
23 the original sentencing and would also consider today,
24 inclusive of the additional facts brought forth by the
25 defendant in court today.

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1 And in his sentencing memorandum, the Court first
2 does look to the nature and circumstances of the offense, which
3 has not changed. The defendant has pled guilty to being a
4 felon in possession of firearms and ammunition.

5 His offense conduct is set forth beginning
6 essentially in Paragraph 10 of the presentence report, which
7 carries forward the factual basis contained in the plea
8 agreement, which discusses the federal search warrant executed
9 at a camper trailer located in defendant's residence in
10 Maryville, Tennessee on August 8th, 2012.

11 The defendant acknowledged possession and existence
12 of a handgun and two long guns inside the camper trailer, and
13 admitted he lived in the camper trailer being searched. And at
14 that time, a loaded Glock Model 21 .45 caliber pistol, a Sears
15 Roebuck brand 12-gauge Shotgun and a Marlin Glenfield Model 74
16 .22 caliber rifle were all found inside the camper trailer.

17 With respect to the history and characteristics of
18 the defendant, his criminal history has been discussed, and,
19 certainly, the Court is cognizant of that criminal history in
20 the somewhat competing viewpoints or how that criminal history
21 should be viewed, but it is extensive.

22 It began at the age of 21 with the various aggravated
23 burglary charges that have been discussed, which the defendant
24 points out via counsel, much of which incurred over a 60-day
25 period, nonetheless he did have multiple aggravated burglary

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1 convictions at the age of 21 in 1997, as well as a burglary
2 conviction, theft of criminal property convictions, and
3 following that, moving to the age of 24, various theft, simple
4 possession convictions, possession of burglary tools, again,
5 multiple theft convictions, and vehicular-related offenses, and
6 drug related offenses, all resulting, as the Court previously
7 discussed, in 12 criminal history points and a criminal history
8 category of V.

9 The defendant at this point of resentencing is
10 currently, I believe, 41 years of age. Is that correct?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: He's been previously married -- or he is
13 married and is the father of one child from a prior
14 relationship, who is currently a teenager.

15 The defendant does report some physical health
16 conditions. His diabetes, which does require multiple shots,
17 as well as medication, as well as knee problems and muscle
18 atrophy from a prior work-related incident.

19 The defendant reports no history of mental or
20 emotional health problems. He states he does not drink alcohol
21 due to his severe case of diabetes. He began using marijuana
22 in his early teenage years and -- as well as prescription
23 painkillers.

24 He attended William Blount High School through the
25 11th grade, and his employment history is somewhat limited,

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1 given his past criminal history, as well as certainly his
2 incarceration over the past several years for the instant
3 offense.

4 And also addressing some of the history and
5 characteristics just discussed by the Court, the Court does
6 take recognition of the fact that the defendant graduated from
7 various drug treatment classes while in custody, as well as a
8 parenting program, and did obtain his GED, took classes to
9 learn to control his diabetes, manage his finances, and support
10 himself upon release from custody. Also it's stated that he
11 has been able -- despite his physical ailments, has been able
12 to and has worked while in prison.

13 With this background in mind, the Court considers the
14 need for the sentence to imposed to reflect various factors,
15 including the seriousness of the offense. While this offense
16 did not involve a victim, per se, nonetheless the defendant is
17 a previously convicted felon, was not allowed to have -- be in
18 possession of firearms or ammunition. And despite that
19 prohibition, was in fact in possession of multiple firearms,
20 loaded firearms with ammunition, which could have resulted in
21 serious conduct on this defendant's part and potentially injury
22 to this defendant or, more particularly, to others around him.

23 The Court considers the need to promote respect for
24 the law and provide just punishment. Again, taking into
25 consideration the seriousness of his offense conduct, also

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1 taking into consideration his criminal history. And, again,
2 the -- the nature and scope and type and age of that criminal
3 history, and the Court further does take into consideration the
4 defendant's acceptance of responsibility for his conduct in
5 this case.

6 The Court considers the need for adequate deterrence,
7 specific to this defendant, the Court would continue to find a
8 need for specific deterrence, again, based on his offense
9 conduct, albeit some years ago now and also his previous
10 criminal history, albeit some years before that.

11 The Court also considers general deterrence, that is
12 fashioning a sentence that would act as a general deterrent to
13 others similarly situated to this defendant who may contemplate
14 the undertaking of similar crimes in the future.

15 And for all the reasons discussed, the Court also
16 takes into consideration the need to protect the public from
17 further crimes of the defendant and to provide the defendant
18 with training, education, and medical treatment, particularly
19 from the standpoint of special conditions of supervised
20 release, which the Court intends to impose.

21 The Court will provide for the defendant to
22 participate in a program of testing and/or treatment for drugs
23 and/or alcohol abuse, given his previous substance abuse
24 history, certainly recognizing the defendant's efforts with
25 respect to drug-abuse classes while incarcerated, but the Court

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1 believing such a provision to be warranted in this case.

2 And in discussing and recommending continued
3 substance abuse treatment, the Court is not intending to and is
4 not imposing or lengthening the defendant's prison sentence to
5 enable him to complete a treatment program or otherwise promote
6 rehabilitation.

7 Turning now to the request the defendant -- excuse
8 me, the government's request for an upward variance, the Court
9 would find it appropriate to distinguish a departure from a
10 variance.

11 Departure referring to the imposition of a sentence
12 outside the Guidelines range due to the application of a
13 particular Guidelines provision, whereas a variance refers to
14 the selection of a sentence outside the Guidelines range based
15 upon the Court's weighing of one or more of the sentencing
16 factors of Section 3553(a), the Court recognizing its
17 discretion to depart or vary as it deems appropriate.

18 Here, the government seeks an upward variance from
19 the Guidelines range. The government, among other things,
20 relies on the number and nature of the defendant's prior
21 convictions, as well as the need to promote respect for the
22 law, afford adequate deterrence, protect the public from future
23 crimes of the defendant, and avoid unwarranted sentencing
24 disparities with similarly situated defendants.

25 First, with respect to the factors cited by the

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1 government in support of a variance, the Court does note a
2 variance is generally proper. It's proper when particular
3 facts regarding the defendant or his conduct take the
4 defendant's case outside the heartland of similar cases the
5 Guidelines were intended to address.

6 In this case, after full consideration of the
7 parties' submissions and arguments, the Court would find that
8 the factors cited by the government in support of a variance
9 from a 3553(a) standpoint do not satisfy that standard, i.e.,
10 do not take this case outside the heartland of cases.

11 First, as to the nature and number of the defendant's
12 past convictions, and, certainly, the Court is again cognizant
13 of that nature and number, the Court notes that many defendants
14 before this Court, including many charged with being a felon in
15 possession of a firearm do have criminal records of varying
16 length, some less than this defendant, some equal to this
17 defendant, and some more than this defendant.

18 And, again, certainly, the Court does recognize, as
19 the government has pointed out, that the defendant has multiple
20 convictions for aggravated burglary. The Court finds that the
21 calculation procedures under the Guidelines manual are designed
22 to account for the number and seriousness of the defendant's
23 past offenses.

24 As to the need to promote respect for the law and
25 provide adequate deterrence and protect the public from future

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1 crimes, the Court has discussed the relative weight of those
2 3553(a) considerations and incorporates that discussion herein.
3 And, certainly, this defendant's criminal background does
4 suggest the appropriateness of these considerations.

5 The Court, again, is cognizant not only of the newly
6 calculated Guideline range, but of the amount of months already
7 served by this defendant, which is roughly double that advisory
8 Guideline range. And the Court would find that those goals of
9 promoting respect for the law, affording general and specific
10 deterrence, and protecting the public to be adequately taken
11 into consideration of this case.

12 Finally, and this may be as much of -- more of a
13 legal argument than a factual discussion, but regarding the
14 need to avoid unwarranted sentencing disparities, the Court is
15 certainly cognizant, and the Court hopes the defendant is
16 cognizant of the fact that he has benefited from the change in
17 law that the Johnson and Stitt decisions produced.

18 In other words, the defendant's armed career criminal
19 designation enabled him to seek relief under Section 2255, and
20 thus, as the government points out, perhaps, receive a lower
21 sentence than a similarly situated defendant sentenced in 2013
22 not as an armed career criminal would have received.

23 But after full -- again, full consideration, the
24 parties' arguments, the Court does not find that this disparity
25 warrants a variance.

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1 For these reasons, as the defendant correctly notes
2 in his sentencing memorandum, disparities resulting from
3 Johnson and the subsequent amendments to the Guidelines will
4 continue so long as defendant's sentence pre-Johnson remain
5 incarcerated. An upward variance in one individual case will
6 not change any system-wide disparity that may result -- that
7 may occur as a result thereof. Instead, it is a consequence of
8 a change in the Guidelines and the background substantive law.

9 The Court noted -- or as the Supreme Court noted in
10 Kimbrough v. United States in 2007, quoting from that case,
11 some departures from uniformity are a necessary cost of the
12 remedies. The Supreme Court has adopted -- again, not quoting
13 now -- but such as in Johnson. Therefore, this factor does not
14 meaningfully distinguish the defendant's case from the
15 heartland of similar cases that come before the Court, which is
16 the guiding principle for the Court.

17 Again, the Court is not overlooking the defendant's
18 somewhat extensive criminal history, the government's position
19 that extreme leniency is not warranted. On the other hand, the
20 defendant's position that the defendant has already served
21 almost now double the time that served -- has served almost
22 double from what the newly calculated Guidelines range is.

23 So the Court does not find the need to avoid
24 unwarranted sentencing disparities to be a reason to otherwise
25 vary or depart upward in this case.

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1 So for all these reasons, the Court is going to deny
2 the government's motion for variance and/or upward departure.

3 The Court will however take the arguments presented
4 into consideration in fashioning a sentence sufficient, but not
5 greater than necessary, to comply with the purposes of
6 18 U.S.C. Section 3553.

7 And in light of all the things discussed, including
8 the advisory Guideline range and the relevant 3553 factors, and
9 considering the arguments of the government and the defendant,
10 the Court is going to impose a sentence of time served. The
11 Court, after some consideration, is going to agree with the
12 government from this standpoint, the Court does not find it
13 necessary or appropriate to impose a Guideline sentence of 30
14 to 37 months.

15 What the Court -- the Court believes, based on the
16 totality of the circumstances in this case, the Court certainly
17 recognizes that time served is above the calculated Guideline
18 range. However, the Court believes it appropriate to
19 essentially correct defendant's sentence to a sentence of time
20 served and to otherwise impose a sentence in this case of
21 three -- excuse me, of 67 months or -- actually, a sentence of
22 time served. Because it may -- I know it was somewhere around
23 67 months. So the Court is going to impose a sentence of time
24 served.

25 For all the reasons discussed, the Court finds this

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1 sentence to be sufficient, but not greater than necessary, to
2 comply with the purposes of 18 U.S.C. Section 3553. And the
3 Court is, again, going to reduce the defendant's current
4 sentence to time served, given he has already served
5 approximately 67 months in Bureau of Prisons' custody.

6 The Court further finds a term of supervised release
7 of three years to be appropriate in this case, as authorized by
8 the applicable statute and Guidelines and after consideration
9 of the 3553(a) factors.

10 And the Court will impose the special conditions
11 previously discussed of participation in substance abuse,
12 testing, and treatment to be warranted in this case, as
13 reasonably related to the several sentencing factors as
14 involving no greater deprivation of liberty than reasonably
15 necessary for the several sentencing factors and to be
16 consistent with pertinent policy statements issued by the
17 Sentencing Commission.

18 Accordingly and pursuant to the Sentencing Reform Act
19 of 1984, it is the judgment of the Court as to Count 1 of the
20 indictment, that the defendant, Tony McClurg, is hereby
21 committed to the custody of the Bureau of Prisons for a term of
22 imprisonment of time served.

23 Upon release from imprisonment, you shall be placed
24 on supervised release for a term of three years. Within 72
25 hours of release from the custody of the Bureau of Prisons, you

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1 shall report in person to the probation office in the district
2 to which you are released.

3 While on supervised release, you shall not commit
4 another federal, state, or local crime, comply with the
5 standard conditions adopted by this Court in Local Rule 83.10
6 and not illegally possess a controlled substance. You shall
7 not possess firearm, destructive device, or other dangerous
8 weapon. You shall cooperate in the collection of DNA, as
9 directed by the probation officer, and comply with the special
10 condition related to testing and/or treatment for drugs and/or
11 alcohol abuse, as discussed by the Court.

12 Title 18 U.S.C. Sections 3565(b) and 3583(g) require
13 mandatory revocation of supervised release for possession of a
14 controlled substance or firearm or for refusal to comply with
15 drug testing.

16 Just a moment.

17 Pursuant to Title 18 U.S.C. Section 3013, you shall
18 pay a special assessment fee in the amount of \$100, which shall
19 be due immediately.

20 I'm assuming that's already been paid, but --

21 THE DEFENDANT: Yes, sir.

22 THE COURT: -- otherwise the Court finds you do not
23 have the ability to pay a fine and will waive the fine in this
24 case.

25 Pursuant to Rule 32 of the Federal Rules of Criminal

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1 Procedure, the Court advises you may have the right to appeal
2 the sentence imposed in this case. A notice of appeal must be
3 filed within 14 days of entry of judgment. If you request and
4 so desire, the clerk of the court can prepare and file the
5 notice of appeal for you.

6 The Court, again, imposes a sentence of time served.
7 I think it's appropriate to order the defendant to be remanded
8 to custody of the Attorney General for fulfillment of that time
9 served. Or is it to U.S. Marshals?

10 THE PROBATION OFFICER: Well, sir, the Attorney
11 General is more appropriate, because the Bureau of Prisons
12 still has to calculate everything and then designate him out.

13 THE COURT: Okay. All right.

14 MS. VOSS: I'll take him.

15 THE COURT: Quizzical looks perhaps from all of us.
16 Bottom line, Mr. McClurg, you know, your sentence imposed of
17 time served is approximately 67 months is substantially less
18 than what it was originally. And I hope you have -- it looks
19 like you have a supportive family and others awaiting you
20 probably in the very near future.

21 I hope you'll take advantage of the opportunity that
22 the change in law has afforded you and recognize that, you
23 know, if -- if you -- if there are violations, such as
24 possession of a firearm, that that could -- that could lead to
25 violations still within the context of this case while you're

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1 on supervised release, as well as perhaps future criminal
2 charges, which you obviously hopefully want to avoid. So just
3 keep all that in mind in light of the sentence imposed here
4 today.

5 So I guess with that having been said, let me ask,
6 does the government -- does the government have any objections
7 to sentence just pronounced that has not previously been
8 raised?

9 MS. NORRIS: The only objection the government has is
10 to the non-designation of the armed career criminal
11 enhancement, and we're objecting to preserve that issue for
12 possible future review, but otherwise no objections, Your
13 Honor.

14 THE COURT: Ms. Voss, does the defendant have any
15 objection to the sentence just pronounced that has not
16 previously been raised?

17 MS. VOSS: I would object to the time served versus
18 the time certain. And I would also preserve that for possible
19 review. So that's all, Your Honor. No other --

20 THE COURT: Anything further on defendant's behalf?

21 MS. VOSS: No. Thank you very much.

22 THE COURT: Anything further from the government?

23 MS. NORRIS: No, Your Honor. Thank you.

24 THE COURT: Thank you everyone for being here this
25 afternoon, and we'll stand adjourned.

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1 THE DEFENDANT: Thank you, Your Honor.

2 THE COURTROOM DEPUTY: All rise. This honorable
3 court shall stand adjourned.

4 (Proceedings adjourned at 4:07 p.m.)
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UNITED STATES DISTRICT COURT

CERTIFICATE OF REPORTER

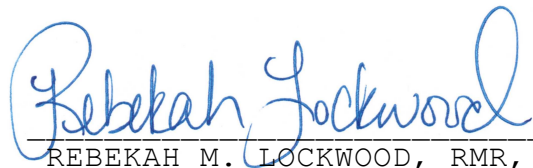
STATE OF TENNESSEE

COUNTY OF KNOX

I, Rebekah M. Lockwood, RMR, CRR, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings; and that the foregoing pages constitute a true and complete computer-aided transcription of my original stenographic notes to the best of my knowledge, skill, and ability.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand at Knoxville, Knox County, Tennessee this 16th day of August, 2019.



REBEKAH M. LOCKWOOD, RMR, CRR
Official Court Reporter
United States District Court
Eastern District of Tennessee